No. 3049.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OLGA SUNDIN, and MARGUERITE SUNDIN, IVER SUNDIN, and EUGENE SUNDIN, Minors, by OLGA SUNDIN, their guardian, *Ad Litem,*

Plaintiffs in Error.

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a corporation,

Defendant in Error.

Petition For Rehearing By Defendant In Error

Upon Writ of Error From the United States District Court for the District of Idaho, Northern Division.

RALPH S. NELSON,
Coeur d'Alene, Idaho.
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Petition For Rehearing By Defendant In Error

Upon Writ of Error From the United States District Court for the District of Idaho, Northern Division.

PETITION FOR REHEARING BY DEFENDANT IN ERROR.

The defendant in error respectfully moves the court and petitions that a rehearing of the above entitled cause be granted for the reasons hereinafter specifically set forth and numbered.

FOREWORD.

We very much dislike to take up the court's time as we know it is very busy, but since frim its opinion in this case it is so apparent that it has misunderstood the facts, and therefore applied clearly erroneous principles of law, we are asking a rehearing that the court may prevent the great confusion that is certain to follow the establishment of the opinion as it now appears in this case.

STATEMENT OF FACTS.

To refreshen the court's memory as to the facts in this case and the questions involved we make the following brief statement of facts:

The deceased was assisting in moving a car two feet high and four feet wide, upon which was piled eight tiers of lumber, six inches wide and one inch thick. The tiers were about fifty boards high, making the top of the load something like six feet from the floor. It was the custom for a fellow-servant when piling the lumber on the car, when the load was getting uneven, to place from two to four laths in the load as cross-pieces to bind the load firm and well balanced (tr. p. 35). No cross-pieces were in this particular load that was being moved at the time of the accident. The track at the place of the accident had become uneven, the ends of one rail stand-

ing an inch and a half higher than the rails adjoining it. In moving the car from the lower rails onto the higher rails two or three attempts had to be made owing to the obstruction, and on account of the shock about one fourth of the load slid off onto deceased who had his back to the load.

The complaint alleges that deceased knew of the unevenness of the track but did not know of the absence of cross-pieces in this particular load, and alleges that the load would not have fallen had the cross-pieces been in the load, even in going over the uneven track. There was no complaint that defendant furnished defective appliances or failed to furnish sufficient appliances. The theory relied on by the plaintiff was that the defendant failed to furnish a safe place to work owing to the concurring negligence of the defendant in furnishing a defective track and of the negligence of a fellow-servant in piling the load in a defective manner, in that he did not put in to said load the laths or cross-pieces.

The lower court directed a verdict for the defendant. The court has reversed the case.

While we think that all of our eight reasons for rehearing hereinafter set forth are well taken, we especially call the court's attention to the reasons set forth in paragraphs one and four of our reasons why the rehearing should be granted.

GROUNDS FOR REHEARING.

We respectfully state that the court should grant us a rehearing of this case for the following reasons, to-wit:

I.

The court in reversing the case inadvertently overlooked the fact that there was no evidence whatever that substantiates paragraph fourteen of plaintiff's complaint, which is as follows:

> "That if said binders or cross-pieces had been put in said load the load of lumber thereon could not and would not have fallen over and upon said Alex Sundin causing his injury and death hereinbefore mentioned."

The complaint alleges the accident was caused by the unevenness of the track and the absence of cross-pieces, and that deceased knew of the unevenness of the track, but did not know of the absence of cross-pieces, and that if the cross-pieces had been in the load it could have been safely moved even over the obstruction. Therefore to make out the plaintiff's cause of action it was necessary for them to prove *that if the cross-pieces had been in the load it would not have fallen.* There is no evidence whatever in the record to prove this necessary element of plaintiff's complaint.

II.

It appears from the court's opinion that its reversal of the lower court was upon a theory of law not set forth in plaintiff's complaint or relied upon in the trial of the cause in the court below, and which was never brought to the attention of the lower court, namely, that the cross-pieces were instrumentalities and appliances and as such a part of the car furnished by defendant, and that defendant was guilty of negligence in furnishing deceased with defective appliances and instrumentalities.

III.

The court erred in holding the defendant guilty of negligence in furnishing defective appliances and instrumentalities, to-wit, the cross-pieces as part of the car, when it appears from plaintiff's complaint and from the evidence in the case that the negligence complained of and relied upon by the plaintiff in error was not a failure to furnish reasonably safe appliances or in furnishing defective appliances but negligence in loading the load in an improper manner, in that the cross-pieces were not placed in this particular load.

IV.

The court erred in holding that the cases set forth in its opinion, and hereinafter mentioned, were

in point, because in those cases the courts held defendant liable in furnishing *defective appliances* and instrumentalities, while in this case there was no claim and no evidence that the cross-pieces were in any manner *insufficient* or *defective* or that the car was defective.

Port Blakely Mill Co. v. Garrett, 97 Fed. 537;

Penna. R. R. Company v. La Rue, 81 Fed. 148.

In the above cases there was defective construction. In this case there was none alleged or proven.

V.

The court overlooked or misunderstood the evidence as it appears in the transcript when it says: "There is no evidence that a load properly bound with strips of lath was in danger of collapsing or had ever fallen from a car."

VI.

The court overlooked or misunderstood the evidence as it appears in the transcript when it says: "There was no evidence that a load, such as this that fell upon Sundin, had ever before been piled upon any car without the use of cross-pieces."

VII.

In the court's opinion there are contradictory and conflicting statements which show the court inadvertently overlooked or misunderstood the evidence when it says: "There is no evidence that the loads properly bound with strips were in danger of collapsing," and that "there was no evidence that ever before had a load been built without cross-pieces"; and then further finds that "the foreman had warned the men (including plaintiff) to keep away from the loads because they were unsafe, when he saw that a load was not piled straight and in such a way as not to be safe," because it follows that if the foreman warned the men to keep away from the load because they were unsafe and if there was no evidence that ever before had a load been built without cross-pieces, it would necessarily follow that there was evidence that loads properly bound with strips were in danger of collapsing.

VIII.

It is apparent from the statements in the court's opinion, wherein it holds that the question of assumption of risk should have gone to the jury, that the court overlooked or entirely misunderstood the evidence as it appears in the transcript, and misunderstood the manner in which the work was being carried on at the time of the accident, in that it appears

undisputedly from the plaintiff's testimony, (a) that the gang of which Sundin was a member passed upon the question when a load should be moved; and (b) in that the court finds there were loaded cars on both sides of the load which caused the injury, and at the same time holds that the foreman had as good an opportunity to see the load as the deceased and to see whether or not there were cross-pieces in the load.

ARGUMENT AND AUTHORITIES.

I.

THE COURT IN REVERSING THIS CASE INADVERTENTLY OVERLOOKED THE FACT THAT THERE WAS NO EVIDENCE WHATEVER TO SUBSTANTIATE PARAGRAPH FOURTEEN OF PLAINTIFF'S COMPLAINT, WHICH IS AS FOLLOWS:

> "THAT IF SAID BINDERS OR CROSS-PIECES HAD BEEN PUT IN SAID LOAD, THE SAID LOAD OF LUMBER THEREON COULD NOT AND WOULD NOT HAVE FALLEN OVER AND UPON ALEX SUNDIN, CAUSING HIS INJURY AND DEATH HEREINAFTER MENTIONED."

We feel that we are partially to blame for not bringing this point more clearly to the Court's attention. The negligence alleged was a failure to furnish a safe place in which to work because of the two

following grounds: (1) That in loading the load no cross-pieces or lath were used, and (2) that the track furnished by defendant was uneven.

The complaint alleges deceased knew of the uneven track but that owing to the absence of the cross-pieces of lath part of the load fell and that "if the *cross-pieces had been in the load it would not have fallen.*"

The plaintiff to make out a case had to prove that *"if the cross-pieces had been in the load it would not have fallen."* This fact is true even under the court's view of the case that the laths were a part of the appliances furnished, to-wit: a part of the car as the standards were a part of the car, in the case of Port Blakely M. Co. v. Garrett, 97 Fed. 537.

There is not one word of evidence in the transcript to prove that if the cross-pieces had been in the load it would not have fallen, or that it could have withstood the jars it received when it went over the raised end of the rail without falling.

It will be noticed that the complaint alleged deceased knew of the uneven track but that notwithstanding such unevenness if the cross-pieces had been in the load it *"could then be moved in safety in the manner in which it was necessary to be moved, and*

in the manner it was being moved, at the time of said collapsing."

Under the plaintiff's theory and under the doctrine of the Garrett case, if the deceased knew of the unevenness of the track, and the accident would have happened just the same if the lath had been in the load, he would have no case. If the lath would not have prevented the load from falling then of course he did not rely on them being in the load and would certainly have assumed the risk. The fact that plaintiffs set up in their complaint that the load would not have fallen if the lath had been present shows the necessity of this element in making out their cause of action. In the proof they entirely failed and the lower court was correct in instructing a verdict for defendant.

For the reasons alone set out above the court should grant a rehearing of the above entitled case, as the lower court was clearly correct in instructing a verdict for defendant.

III.

THE COURT ERRED IN HOLDING THE DEFENDANT GUILTY OF NEGLIGENCE IN FURNISHING DEFECTIVE APPLIANCES AND INSTRUMENTALITIES, TO-WIT, THE CROSS-PIECES AS PART OF THE CAR,

WHEN IT APPEARS FROM PLAINTIFF'S COMPLAINT AND FROM THE EVIDENCE IN THE CASE THAT THE NEGLIGENCE COMPLAINED OF AND RELIED UPON BY THE PLAINTIFF IN ERROR WAS NOT A FAILURE TO FURNISH REASONABLY SAFE APPLIANCES, OR IN FURNISHING DEFECTIVE APPLIANCES BUT NEGLIGENCE IN LOADING THE LOAD IN A PROPER MANNER, IN THAT THE CROSS-PIECES WERE NOT PLACED IN THIS PARTICULAR LOAD.

THE EXAMPLE OF THE LOAD OF HAY.

This court in its opinion refers to the fact that the lower court in instructing the jury to return a verdict for the defendant used for illustration, the case of two workmen engaged in loading hay upon a wagon, and refers especially to the fact that the court below said that the employer could not be responsible because he could not anticipate that one of the men was going to be negligent. This court also in its opinion says that it cannot agree that the illustration presents the situation found in the record. The illustration was probably somewhat meager, but it must be apparent that the lower court cited it as an example to the jury when he took the case away from them, simply to explain why the case was being taken away from them. The jury would not have un-

derstood an argument on the question as to who were fellow-servants and the court probably did not feel called upon to go into the matter fully. We will hereinafter show how the court's example was in point.

The failure to put in the cross-pieces was a defect in the manner of loading the load and not neglect of the employer in providing defective appliances or instrumentalities. We desire to emphasize emphatically that there was no complaint or evidence anywhere in the record that the defendant was carrying on its work in a careless or negligent manner or that the cross-pieces furnished were insufficient in number or in any manner defective. In a load of 12-inch boards no cross-pieces whatever were necessary or were used. (Tr. p. 100). In a load of six inch lumber as in the case at bar from two to six pieces of lath were used simply to make the load level and solid, and to keep the load or any part of it from falling. (Tr. p. 96). If the load as it was being built appeared to be level only two cross-pieces would be put in the entire load. If the boards were uneven and the load appeared not to be straight as high as six cross-pieces would be used. The number of laths or cross-pieces depended upon the manner in which a load was going up. Their presence or absence depended upon the manner in which the load was being built.

The lumber in question was wet green lumber, unplaned and direct from the mill. Its rough sides tended to bind it together. The cross-pieces also tended to bind it together. The fact that the rough surface of the boards and the cross-pieces in the loads answered the purpose of keeping the load from falling did not make the rough surfaced boards or the cross-pieces instrumentalities or appliances or a part of the equipment of the car, as the standards did in the Garrett case.

Following out the Court's conclusion as expressed in its opinion in this case, that the lath was part of the equipment, that is a part of the car furnished by the defendant as the standard in the Garrett case, if an employee was moving some rock, gravel and soil on a flat truck, car, wheel barrow or wagon, and as was his custom, did not use any sides, whatsoever, but would place along the sides of the wagon bed the larger rocks to hold the other parts of the load solid, the rocks would be a part of the equipment or appliances furnished by the master. It seems to us that the court has confused the manner of loading which was the negligence alleged by the plaintiff with the failure to furnish a safe car as was the question in the Garrett case.

The evidence shows that the defendant sawed its boards in all lengths. Some of the boards were sawed in four foot lengths, and the cars on which the boards were piled were four feet wide. Suppose the transfer men in loading one of the cars with four foot lumber in two or three places in the load would put some of the four foot boards crosswise of the load so as to make the load more secure than it would be if all the boards were placed lengthwise, would the court hold that the boards that were put in crosswise of the load were a part of the equipment or appliances, in fact a part of the car that the defendant furnished, and that the boards that were placed lengthwise were not a part of the equipment and no part of the car?

It seems to us that since the defendant never used standards or side-pieces on its car, but simply tried to pile the lumber on its car in such a manner as to make it solid, that the court cannot say, in the absence of allegations of furnishing defective appliances, that the laths were defective appliances, or that they were a part of the car.

Taking up the lower court's example of the load of hay, we think it was in point if carried to a logical conclusion in the light of the circumstances in this case. If the farm hand was injured by having one-fourth of a load of hay slide off on to him, and would

sue the farmer, setting up that the hay was caused to slide off by reason of a rough place in the road and on account of the fact that the hay was piled on to the rack in a loose manner, instead of being tied in bundles, as was customary, and that it would not have fallen if tied, and at the trial would show that there was sufficient twine in the field with which to tie the hay, and that a fellow-servant simply omitted to tie the hay in this particular load, we feel satisfied that this court would not hold that the twine furnished the men in the field was a part of the appliance furnished for moving the hay or a part of the wagon, simply because it answered the same purpose as side boards would have done on the hay rack, to-wit: keeping the hay from falling off the load. The defendant might adopt several methods of carrying on his work, such as using twine or lath to bind the load to make it level and in the absence of allegations as to the negligent manner of carrying on his work would not be held liable for failure to furnish safe appliances. Suppose the defendant had been moving a load of lath at the time of the accident. It is common knowledge that laths are bound into bundles of about twenty-five each by means of a piece of twine. If the defendant had been moving a load of lath at the time of the accident and owing to the fact that a co-employee of the plaintiff had failed to securely tie one or more bundles of lath, when suffi-

cient twine had been furnished him and an account of such failure to properly tie the laths, a part of the load of lath had fallen upon the deceased and injured him, would this court have held the defendant liable on account of failure to furnish safe appliances under the authority of the Garrett case, even though the twine answered the same purpose in a way that the standard did on the side car in the Garrett case?

IV.

THE COURT ERRED IN HOLDING THAT THE CASES SET FORTH IN ITS OPINION, AND HEREINAFTER MENTIONED, WERE IN POINT, BECAUSE IN THOSE CASES THE COURTS HELD DEFENDANT LIABLE IN FURNISHING DEFECTIVE APPLIANCES AND INSTRUMENTALITIES, WHILE IN THIS CASE THERE WAS NO CLAIM AND NO EVIDENCE THAT THE CROSS-PIECES WERE IN ANY MANNER INSUFFICIENT OR DEFECTIVE, OR THAT THE CAR WAS DEFECTIVE.

The court in this case apparently decided this case upon the authority of one of its former opinions in the case of Blakely Mill Co. vs. Garrett, 97 Fed. 537. In so deciding the case at bar this court evidently came to the conclusion that cross-pieces or

strips of laths were instrumentalities and as such a part of the equipment of the car as were the standards on the side of a railroad flat car, because they answered the same purpose, to-wit, that of keeping the load from falling off the car. The court cannot claim that the lath were properly a part of the car as were the standards in the Garrett case. In the Garrett case there were iron sockets on the side of the car into which the standards fitted. The standards were as much a part of the car as were the sides of a cattle car or the sides of a coal car. They were supposed to hold the lumber on the car when the load would shift over against it when the train was moving. They had necessarily to be strong. It was proven in the Garrett case that the standards were uniformly used for this purpose of holding the load on the car and had to be very strong and had to be made of oak. It was contended in the Garrett case they were defective in that theye were made of a soft wood. It was a contention of original defective construction. There is no contention in this case of defective construction or defective instrumentalities. The fact that the lath might incidently answer the purpose of keeping the load from falling would not make them instrumentalities or a part of the car as were the standards. The defendant was using a different manner of loading his load. He

was using strips of lath to make his load level or to bind it and was not using any standards whatever. If it were negligent in not using such standards that question is not in this case. Now if the laths simply bound the load as would be the case by placing part of the load itself crosswise, that could not make the strips instrumentalities or a part of the equipment of the car. It seems beyond dispute that the strips were not such instrumentalities as to be a part of the car. Now if in the Garrett case a fellow employee had so used the car as to run it upon Garrett and injured him the court would have said since the instrumentality, that is the car, including the standard, was reasonably safe, therefore the employer is not liable, and in the case at bar the fellow employee having been furnished the strips the defendant should not be liable. There is, we repeat, no question here, as there is in the Garrett case, of furnishing defectively constructed appliances. If the court holds that the lath were instrumentalities, they were separate instrumentalities from the car as much as a crowbar would be by which a load might be raised onto a car. If there was a failure to use lath not defective it was a detail of the work such as not to make the master liable.

Bundles of lath were taken from the same mill on the same cars by the same men. They

are wrapped in bundles by twine and placed on cars no standards are used. Is the twine around the lath an instrumentality and as such a part of the car. The twine answers the same purpose in a way that the standards do and the lath do in a load of lumber, still they are not a part of the car. As was shown, the defendant cut its boards into all lengths. Suppose the transfer men in loading four foot lumber every so often placed a layer or two, or three layers, cross-wise as they often did, the cars being four feet wide, would this court hold that the boards placed lengthwise were not instrumentalities, but that the boards placed crosswise were instrumentalities and as such a part of the car?

There is no question in the Garrett case of an improper manner of loading the car and that case is not in point. That was a case of improper construction of a car. That case is cited generally by other courts and commented upon under the heading of duty of railroads to furnish safe cars. It was decided upon this one theory alone.

The Garrett case is cited in the case of Lane Brothers Company v. Couch, 192 Fed. 509, by the Circuit Court of Appeals, Sixth Circuit, under the heading "Equipment of Railroad Cars." The court says in its opinion, after discussing the question of *res ipsa loquitur* and contributory negligence, as follows:

> "These considerations aside there remains the question of whether a matter of providing this car with side standards pertained to the employer's duty to furnish a suitable car properly constructed and equipped, and so to a nondelegable duty, or whether it pertains to the loading of the car, and so would bring into the action the fellow servant rule. If the former, the case was properly submitted to the jury; *it might be otherwise if the case was of the latter class.* If we had to do only with the matter of staying the tops, or *respective* opposite standards, *by wire or by cross-pieces, that might involve only the loading operations;* but this record is not so shaped as to present that question by itself."

Of course in that case it was proven that it was necessary to have sides on a car. Such is not a fact in the case at bar. As a matter of fact in this case it was alleged that it was usual and customary to operate cars without such sides. It was not necessary to have any sides on the cars whatever. It was not necessary with most of the lumber to even have cross-pieces. It was usual when a load was built of six inch boards to simply put in a few lath every once in a while when the load would become uneven or shaky as it was built up. It all depends on the manner in which that particular load was being loaded whether cross-pieces were used or not and how many cross-pieces were used. There was no proof or allegation that the cross-pieces were defective or insufficient. The complaint was simply that the transfer-shed-men failed to put in the cross-pieces in

the load when they were building it, and therefore left it shaky.

The court in its opinion cites the case of Railroad Company v. LaRue, 81 Fed. 148, which seems to have been the guiding authority of this court in the Garrett case. The LaRue case simply holds that the standards of a gondola car are a part of the equipment and that it is the duty of the employer to furnish reasonably safe equipment. Of course the question of fellow-servant does not enter into either case when it is a question of the master failing to furnish safe appliances, and the question of fellowservant therefore did not enter into the LaRue case. The LaRue case has been cited in 146 Fed. p. 29 by the Circuit Court of Appeals, third circuit, and in a decision written by Justice Gray he discusses the question and distinguishes between the question of safe appliances and the manner of loading cars. Justice Gray says:

> "The counsel for appellee apparently rely upon the opinion of this court, in the case of Penna. R. R. Co. v. La Rue, 81 Fed. 148, 27 C. C. A. 363. We do not think, however, that the ratio decidendi of that case conflicts with that of our opinion in the present case. The injuries inflicted upon a locomotive fireman in that case, were due to the shifting of large pieces from the top of a car loaded with lumber. The car was a gondola car and the lumber wes held in place by wooden standards along the sides. A gondola car, when used as a lumber car, must

be equipped as such, and the standards necessary for this equipment must be sufficient for their purpose, that is, long enough and strong enough to hold the lumber piled upon the car in place. These standards are part of the permanent equipment of a car so used, and it was undoubtedly the duty of the defendant company, as being a master's duty, to see that the car in this respect was fit for the purposes for which it was used, by a proper equipment of standards. Some of these standards were of hemlock, instead of oak, as they ought to have been, and gave way to the pressure of the lumber, allowing some of the sticks to protrude, which occasioned the injury to the plaintiff. A defect in the standards or equipment of the car, was a defect in the car itself, as a lumber car, and was due to the negligence of the defendant company as much as would have been a defect in a box car that allowed any portion of its load to escape, to the injury of one situated as the plaintiff in the case was. Judge Anderson, in delivering the opinion of the court, says:

"In the present case, the negligence which caused the mischief was not the improper or insecure loading of the car, for in this regard there was no fault, nor was this a case of the negligent use by the defendant's employees of safe appliances. The ground of complaint here is, that the defendant failed in the positive duty it owed to the plaintiff to equip the car with reasonably safe appliances for the service in which it was employed. * * * * Its whole duty to the plaintiff was not fulfilled, short of the actual proper equipment of the car."

"In another place, the learned judge says:

"In the case of a low sided gondola car employed in the transportation of lumber, side

> standards to keep the load in place * * * are appliances necessary for the proper equipment of the car, and as essential to the safe transportation of the load as is a proper car body."

We submit that in this case this court can not logically without allegations or proof to that effect hold that the lath were a part of the equipment of the car.

If the lath were appliances at all they were separate from the car and were not defective as were the standards in the Garrett case. If they were separate appliances and being furnished by the master the failure on the part of an employee to use them on one occasion would be such a detail of the work as not to make the master liable.

V.

THE COURT IN ITS OPINION SAYS THAT THE QUESTION OF ASSUMPTION OF RISK AND OF CONTRIBUTORY NEGLIGENCE SHOULD HAVE BEEN SUBMITTED TO THE JURY AND FURTHER SAYS:

> "THERE WAS NO EVIDENCE THAT A LOAD PROPERLY BOUND WITH STRIPS OF LATH WAS IN DANGER OF COLLAPSING OR HAD EVER FALLEN FROM THE CAR."

Before quoting all of the evidence introduced by the plaintiff relative to this question we desire to call

the court's attention to the facts, first that only about 100 boards fell from the car at the time of the accident in question and there were eight tiers of from 50 to 60 boards on the car or from 400 to 480 boards. The plaintiff's testimony as to the part of the load that fell and caused the death of the deceased was as follows (Tr. pg. 38):

> Q. About how much of the lumber fell from off that load, Mr. Moe?
>
> A. I didn't count them, but it must have been something about 100 pieces or a little more probably.

In the second place we desire to call the court's attention that not only was there evidence that a load properly bound would fall, but that plaintiff's own witnesses showed that the deceased was a man of experience; that a man of experience is watching for loads to fall and that notwithstanding the fact that the ordinary number of cross-pieces were in the load, such loads would and did frequently fall. (Tr. pg. 101).

THE COURT: Q. I want to ask the witness a question. You spoke of warning these men (including deceased) from time to time as you saw that a load did not seem to be quite safe. Is that more or less of a common thing, that a load would not be safe?

A. Yes, sir, so far as I have known in lumber yards, it is a common thing that some loads are not safe.

THE COURT: Q. Why wouldn't they be safe? I mean what would be the reason for the peril? Can you give an illustration?

A. Well, some times the chainers don't pay enough attention to loading them straight and nice, and sometimes there will be a rush for a little bit, for a few minutes, and lots of reasons and once in a while there will be a load that is not safe.

MR. NELSON: Q. Is it not a fact that always above the last cross-piece there are a number of pieces that are not held by anything?

A. There should be, but sometimes there will be only a few boards, some times. If the transfer men think a load is big enough they will take it out even though the cross-pieces are right on the top.

Q. But usually there are a number of tiers above the last cross-piece?

A. There should be and usually is.

Q. Is it not a fact that a board may fall off no matter how well the load may be loaded?

A. Yes, it might fall off no matter how they were loaded. I have seen that.

Q. And a tier of a load or the top of two tiers or three tiers might slide off the load.

A. I have seen that too.

Q. And that is a thing that may happen in any yard is it not?

A. Yes, it might happen in one yard as well as another.

Q. And that is one of the things that a man of experience moving trucks guards against, it is not?

A. Yes, it is the same as any other kind of work, it don't make any difference what it is, they have got to look for something.

MR. PLUMMER: Q. Mr. Moe, Counsel asked you if some times lumber did not fall from off these cars, now in moving these cars of lumber of the kind that was being moved when Sundin was hurt, and the distance it was being moved before it came to this end of the track that we claim was out of repair, before it came to that, and being shoved along as has been described here what would cause the lumber to fall off going that distance under those circumstances?

A. I could not tell.

Q. Do you know of anything.

A. No.

MR. NELSON: Q. But it will sometimes do it won't it, Mr. Moe?

A. Certainly it will.

It must be evident from the foregoing testimony that there was evidence that a load properly bound with strips of lath was in danger of collapsing. The evidence shows that in some loads similar to the one in question only two cross-pieces are used. Suppose these cross-pieces were in about the middle of the load we would have eight tiers of six inch boards piled side by side, twenty-five boards in height above the cross-pieces. Can the court not say as a matter beyond dispute in the light of the testimony in this case that the tops of such tiers or the entire side tiers of such a load might not fall off? The record is clear that Sundin and his fellow servants were warned by the foreman Moe to keep away from the sides of the cars when they appeared dangerous. The court has said that there was no evidence that in any other load prior to this time had the cross-pieces been omitted. There is therefore only one conclusion and that is that parts of the loads would fall as testified to by Mr. Moe, (page 101 of the transcript) no matter how they were piled or how many cross-pieces or laths were put into them.

VI.

AS TO ASSIGNMENTS OF ERROR SIX AND SEVEN.

As these two assignments of error are so nearly alike we will discuss them together. The court says in its opinion as a reason why the question of assumption of risk should go to the jury, that "there was no evidence that the loads properly bound with strips were in danger of collapsing or had ever fallen," and also said that there was no evidence that such a load as this that fell on Sundin had ever before been piled on a car without the use of cross-pieces. The court then further states that the evidence shows that the foreman when he saw a load that was not piled straight and was in such a way as not to be safe, that he warned the men (including deceased) to keep away from the side of it.

It must appear to the court that the above statements are absolutely conflicting. The evidence shows that no matter how careful the load might be piled, and notwithstanding the usual amount of cross-pieces that were put in the load, still they would fall. There can be no doubt that if the foreman warned the men to keep away from the side of the loads because they were unsafe for the reason that they were not piled straight, and there was no evidence

that ever before had a load been built without cross-pieces, it would necessarily follow that there was evidence that loads properly bound with strips were in danger of collapsing.

VIII.

IT IS APPARENT FROM THE STATEMENT IN THE COURT'S OPINION, WHEREIN IT HOLDS THAT THE QUESTION OF ASSUMPTION OF RISK SHOULD HAVE GONE TO THE JURY, THAT THE COURT OVERLOOKED OR ENTIRELY MISUNDERSTOOD THE EVIDENCE AS IT APPEARS IN THE TRANSCRIPT, AND MISUNDERSTOOD THE MANNER IN WHICH THE WORK WAS BEING CARRIED ON AT THE TIME OF THE ACCIDENT, IN THAT IT APPEARS UNDISPUTEDLY FROM THE PLAINTIFF'S TESTIMONY, (a) THAT THE GANG OF WHICH SUNDIN WAS A MEMBER PASSED UPON THE QUESTION WHEN A LOAD SHOULD BE MOVED; AND (b) IN THAT THE COURT FINDS THERE WERE LOADS ON BOTH SIDES OF THE LOAD WHICH CAUSED THE INJURY, AND AT THE SAME TIME HOLDS THAT THE FOREMAN HAD AS GOOD AN OPPORUNITY TO SEE THE LOAD AS THE DECEASED AND

TO SEE WHETHER OR NOT THERE WERE CROSS-PIECES IN THE LOAD.

It appears from statements in the court's opinion that the court has misunderstood the evidence, because at page 78 of the transcript it shows that the gang of which Sundin was a member passed upon the question as to when a load was to be taken out, and that at the time of the accident the foreman, Mr. Moe, was sixty feet away from the car (tr. pg. 98 and 99). The court holds that he had as good an opportunity to see the car as deceased. If he did the court necessarily holds that there was no car to the west side of the car in question, because Mr. Moe, the foreman, was sixty feet west of the car at the time of the accident. If there was no car on the west side of the car in question, then the deceased was under no necessity or requirement, even under his theory of the case, to go along side of the load.

From the uncontradicted statements appearing in the opinion and from the apparent misunderstanding of facts of this case, we feel in justice to the defendant in error and to the lower court that a rehearing should be granted. We feel that if this opinion is permitted to stand great confusion among the litigants of this circuit will be brought about because it is now the settled law that where the master furnishes reasonably safe appliances and a co-em-

ployee in a detail of the work omits to use such appliances, or uses them in a negligent manner, that defendant is not liable.

We respectfully submit in conclusion that the Garrett and La Rue cases do not support the conclusion reached by the court in this case. The lath in the case at bar certainly cannot be held to be a part of the car. If they were not a part of the car, then in the most favorable view possible to the plaintiff in error they were separate appliances furnished by the master. The evidence shows in this case that there were sufficient appliances on hand at the time of the accident (tr. p. 38) and that they were not defective in any manner, and that a co-employee of plaintiff carelessly failed to use the same. In addition to this clear reason for a rehearing in this case there appears the other equally clear ground for a rehearing that there was no evidence whatever introduced in the lower court that even though there had been cross-pieces in the load in question the accident would not have happened.

DETAILS OF THE WORK.

In this case there being no allegation that the car was defective or that the cross-pieces were defective or that the lath were part of the equipment of the car, it necessarily follows that the lath were put in the load simply as a part of the system or man-

ner of work adopted by the employer. In some loads no cross-pieces were placed, in other loads as many as six cross-pieces would be used. The placing of these cross-pieces or lath in a load depended upon the judgment of the person loading the load and was a detail of the work that the master could not possibly look after himself, but had a right to delegate to a competent employee. This doctrine has been built up because it is evident that an employer cannot oversee every detail of his work or he would be required to have in every case a man watching every man at work. LaBatt on Master and Servant says, in paragraph 1533:

> "It is well settled that, where the master has provided an adequate and readily accessible stock of suitable appliances in good condition, from which to make a selection, and the imperfection of an instrumentality selected therefrom was, or ought to have been, apparent to the servant who selected it, the master cannot be held responsible for injuries which are sustained by the use of that instrumentality, whether the sufferer be the servant himself who made the selection, or a coemployee."

Many cases are cited to sustain this rule of law. The author also says in paragraph 1534:

> "Another kind of dereliction of duty which is regarded as characteristic of a servant, and not of the master, is that which consists in the failure of a fellow servant to make use of suitable appliances furnished by the master for the work in hand."

Many instances are cited by the above author and they are exactly similar to this case. In this case, there is no complaint as to the incompetency of the fellow servant or as to the manner of doing the work. The complaint is simply as to the detail of the work, to-wit, that a fellow-servant omitted putting a lath, which was no part of the equipment of the car, into the load.

The evidence shows that there were sixty-eight cars on one side of the transfer shed and seventy on the other, and under the decision of this court as it now stands this employer would be required to have as many inspectors as it has men working at loading these cars, because if he did not watch every detail of the work he would not know whether the lath were inserted, when in the judgment of the employee they should be inserted in a load.

In conclusion we respectfully submit that the court decided this case upon the theory that defective appliances were furnished the deceased when in fact there was no allegation in the pleadings and no evidence to suggest such a conclusion. The court evidently held that the lath were a part of the equipment of the car when the pleading and evidence will not sustain such a holding. If the lath were separate appliances so that the car was not defective in equip-

ment and construction the Garrett and La Rue cases do not apply. If the lath were separate appliances from the car the failure to insert them was a detail of the work and certainly there was no evidence that the accident would not have happened even though the cross-pieces had been in the load, therefore we respectfully ask that the court grant us a rehearing in this case.

Respectfully submitted,

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